FILED
SEP 3 1993
OFFICE OF THE CLERK

No. 92-1183

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STEPHEN A. KNOX,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE UNITED STATES

James P. Mueller*
Len L. Munsil
National Family Legal Foundation
5353 N. 16th Street, Suite 400
Phoenix, Arizona 85016
(602) 265-1513

Counsel for Amicus Curiae

*Counsel of Record

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES.....ii

CONSENT OF THE PARTIES.....1

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....3

LAW AND ARGUMENT.....4

KNOX'S CONDUCT BRINGS HIS ACTIVITY AND THE MATERIAL AT ISSUE WITHIN THE LEGITIMATE REACH OF 18 U.S.C. § 2252(a)(2).....4

1. The Purpose of the Sexual Exploitation Statute is to Protect Children.....6

2. Evidence of Pandering May Be Decisive in Determining Obscenity.....10

3. Evidence of Pandering is Relevant and May Be Decisive to the Question of Child Pornography.....14

4. The Record is Replete with Evidence of Pandering.....17

CONCLUSION.....20

TABLE OF AUTHORITIES

Cases — Pages

Ginzburg v. United States
383 U.S. 463 (1966).....*Passim*

Globe Newspaper Co. v. Superior Court
457 U.S. 596 (1982) 8

Hamling v. United States
418 U.S. 87 (1974).....13

New York v. Ferber
458 U.S. 747 (1982).....7, 10, 15

Osborne v. Ohio
495 U.S. 103 (1990).....8, 10

Paris Adult Theatre I v. Slaton
413 U.S. 49 (1973).....11

Roth v. United States
354 U.S. 476 (1957).....4, 10

Splawn v. California
431 U.S. 595 (1977).....12

United States v. Dost
575 F.2d 1303 (10th Cir. 1978), *cert. denied*,
439 U.S. 916 (1978).....13

United States v. Hamling
481 F.2d 307 (9th Cir. 1973).....14

United States v. Knox
977 F.2d 815 (3rd Cir. 1992).....10, 17

Statutes

18 U.S.C. § 2252.....3

18 U.S.C. § 2256.....3

Other Authorities

H. Rep. No. 536, 98th Cong., 1st Sess.,
(Nov. 10, 1983), reprinted in 1984 U.S.
Code Cong. & Admin. News.....6

S. Rep. No. 438, 95th Cong., 2d Sess.,
(1977), reprinted in 1978 U.S.
Code Cong. & Admin. News.....7

CONSENT OF THE PARTIES

Attorneys for Petitioner and Respondent have consented to the filing of an amicus curiae brief by National Family Legal Foundation. (Appendix A).

INTEREST OF AMICUS CURIAE

National Family Legal Foundation ("NFLF") is a non-profit legal organization founded in 1990. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography, especially child victims. NFLF provides public information on legal and social issues related to pornography, and on sexual exploitation and victimization by child pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First

Amendment/pornography area.

NFLF's former Executive Director, Alan E. Sears, was also the Executive Director of the Attorney General's Commission on Pornography. The Commission, after more than two years of examining the issue from legal, moral, clinical, social scientific, and other relevant perspectives, concluded that possession of child pornography is so intimately connected to the acts of child molestation depicted that a prohibition on possession of such material was required and that such laws needed to be zealously enforced, in a constitutional manner, for the protection of children.

NFLF seeks to file an amicus curiae brief in support of the United States in this case. NFLF is profoundly concerned with the victimization and exploitation of children by child pornographers. It believes the circuit court's decision is a reasonable and constitutional interpretation of the federal child exploitation statute.

SUMMARY OF ARGUMENT

The defendant was convicted of violating 18 U.S.C. § 2252(a)(2), which prohibits the sexual exploitation of children through the receipt of materials depicting minors engaging in sexually explicit conduct and by possessing three or more videotapes that contained visual depictions of a minor engaging in sexually explicit conduct. The court has granted certiorari to review whether there can be an "exhibition of genitals or pubic area" under § 2256(2)(E) under circumstances where the genitals and pubic area are scantily clad.

The sole purpose of the child exploitation statutes is to protect children. Because this governmental objective is of surpassing importance, pornographic materials that may not be obscene but which depict children fall outside the protection of the First Amendment.

In obscenity cases, evidence of pandering may be decisive to the issue of obscenity. This same concept -- pandering -- should be applied to child pornography cases. When applied to the facts of this case, it is clear that the defendant's conduct falls within the legitimate reach of the child exploitation statute and his conviction should be affirmed.

LAW AND ARGUMENT

KNOX'S CONDUCT BRINGS HIS ACTIVITY AND THE MATERIAL AT ISSUE WITHIN THE LEGITIMATE REACH OF 18 U.S.C. § 2252(A)(2)

Because of the very nature of child pornography and obscenity cases, the materials themselves are sometimes improperly placed "on trial". As a result, the focus is taken away from the defendant. But as Chief Justice Warren reminded us in *Roth v. United States*, 354 U.S. 476, 495 (1957): "It is not the book that is on trial; it is a person.

The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character." (Warren, C. J., concurring). In this case, the conduct of defendant Stephen Knox ("Knox") must be the central issue.

In obscenity cases, the defendant's conduct and pandering evidence allow the trier of fact to consider the role that exploitation and a defendant's motivation play in deciding the obscenity *vel non* of the material itself. Just as pruriency is a quality of the material itself, circumstances showing why and how an item was marketed or promoted bear on whether a defendant exploited its commercial sex value or whether he legitimately relied on its serious value for his economic success.

Similarly, evidence showing why and how Knox's materials were marketed or promoted bear on whether these

materials were possessed for their "innocent" qualities and serious art value, or for their exploitive nature. This evidence of the defendant's conduct and of pandering is also relevant to the determination of whether the materials constitute child pornography.

1. The Purpose of the Sexual Exploitation Statute is to Protect Children

Federal statutes prohibiting the sexual exploitation of children through the production of pornography -- as distinct from federal prohibitions on the distribution of obscene materials generally -- are of relatively recent origin. They reflect a concern that "[e]ach year tens of thousands of children under the age of 18 are believed to be filmed or photographed while engaging in sexually explicit acts for the producer's own pleasure or profit." H. Rep. No. 536, 98th Cong., 1st Sess., (Nov. 10, 1983), reprinted in 1984 U.S. Code Cong. & Admin. News, 492.

Congress recognized that the distribution and receipt of child pornography contributes to further incidents of child abuse:

> [M]any pedophiles -- those whose sexual preference is for children -- prefer to purchase [child pornography] through mail order catalogues. This is because often these catalogues permit the pedophile to order materials depicting specific sexual deviations, to establish contact with other pedophiles, and even to establish liaisons with some of the child models.

S. Rep. No. 438, 95th Cong., 2d Sess., at 5 (1977), reprinted in 1978 U.S. Code Cong. and Admin. News, 43.

This Court recognized the substantial governmental interest in protecting children from the evils of child pornography in *New York v. Ferber*, 458 U.S. 747 (1982). In an opinion by Justice White, the Court upheld a New York statute which prohibited the distribution of materials which depict children engaging in sexually explicit conduct whether or not such depictions are "obscene".

First, the Court found that "[i]t is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'" and the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *Id.* at 756–57, quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Further, the Court went on to say:

> The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.

Id. at 759 (footnote omitted). The Court concluded, because of the compelling state interests involved, that child pornography, even though not obscene, was not protected by the First Amendment.

Finally, in *Osborne v. Ohio*, 495 U.S. 103 (1990), this Court approved a law prohibiting the possession of child pornography, even in one's own home. In upholding the statute, this Court further addressed the impact of this vile crime:

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain....[E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Id. at 110–11.

It must be remembered that in this case, whether genitals and pubic area are scantily clad or not, the children forced to pose for these provocative videotapes are victims who are exploited for the sexual gratification of adults. Knox is a pedophile, and the materials are obviously directed at pedophiles:

> The tapes contained numerous vignettes of teenage and preteen females, between the ages of ten and

> seventeen, striking provocative poses for the camera. The children were obviously being directed by someone off–camera. All of the children wore bikini bathing suits, leotards, underwear or other abbreviated attire while they were being filmed. The government conceded that no child in the films was nude, and that the genitalia and pubic areas of the young girls were always concealed by an abbreviated article of clothing. The photographer would zoom in on the children's pubic and genital area and display a close–up view for an extended period of time. Most of the videotapes were set to music. The films themselves and the promotional brochures distributed by Nather demonstrate that the video tapes clearly were designed to pander to pedophiles.

United States v. Knox, 977 F.2d 815 (3rd Cir. 1992). The same compelling state interests which were present -- and carried the day -- in *Ferber* and *Osborne*, and any child pornography case, are present in this case.

2. Evidence of Pandering May be Decisive in Determining Obscenity.

Pandering is "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Ginzburg v. United States*, 383 U.S. 463, 467 (1966), quoting *Roth v. United States*, 354

U.S. at 495–96 (Warren, C.J., concurring). In *Ginzburg*, the defendant was convicted of violating the federal obscenity statute as a result of mailing three different publications. Routinely, on questions of obscenity, the Court considers the materials as sufficient in themselves for that determination. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973). But in *Ginzburg*, the prosecution charged the offense of obscenity in the context of the circumstances of production, sale, and publicity and conceded that, standing alone, the publications themselves might not be obscene. *Ginzburg*, 383 U.S. at 465. The Court approved this approach.

> We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise... we view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

Id. at 465–66 (emphasis added).

The Court concluded:

> Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity.

Id. at 470. Thus, in *Ginzburg*, even though the three publications were not "hard core pornography", and presumed not obscene *per se*, they were deemed obscene because their prurient qualities were pandered or exploited by the defendant.

The development of this concept led the Court to hold in *Splawn v. California*, 431 U.S. 595, 598 (1977):

> There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene.

Further, despite the defendant's objection that the jury instruction allowed "the jury to consider motives of commercial exploitation on the part of persons in the chain

of distribution of the material other than himself", the Court found no constitutional problem. *Id.* at 599.

In *United States v. Dost*, 575 F.2d 1303 (10th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978), the circuit court held that evidence of pandering was admissible as relevant to whether the materials were obscene, even though the defendants were not charged with pandering and despite pandering not being an "element" of the crimes charged. As stated by the court, at 1305, the jury "could take into consideration the 'setting' in which the photographs and brochures were presented by the two defendants."

Finally, this Court upheld in *Hamling v. United States*, 418 U.S. 87 (1974), an instruction that the jury could consider evidence of pandering in applying the three-part obscenity test. The instruction approved by the Court stated, in part:

> In summary, evidence of pandering simply is useful in applying the basic obscenity test where an exploitation of interest in titillation by pornography

> is shown with respect to the material lending itself to such exploitation through pervasive treatment or description of sexual matters. Such evidence may support the determination that the material is obscene, even though, in another context, the material would escape such condemnation.

United States v. Hamling, 481 F.2d 307, 322 (9th Cir. 1973).

Pandering is an important consideration in an obscenity case and similar evidence should be used to make a determination of whether an item constitutes child pornography.

3. Evidence of Pandering is Relevant and May Be Decisive to the Question of Child Pornography

Knox's conduct shows that he intentionally brought his activities and the material at issue within the legitimate reach of the child exploitation statute. These child depictions were "pandered" as clearly as Ralph Ginzburg pandered his otherwise non-obscene material into the reach of the obscene mailing statute.

The child exploitation statutes are intended by Congress, as evidenced by the plain meaning of the statutes read as a whole and as discussed earlier, to prevent and prohibit the exploitation of minors for sexual purposes. Applying the pandering principle is a proper and established method for courts to determine whether the defendant should be convicted by focusing on the conduct of the defendant as "pornographer", "child pornographer", "sexual-exploiter", or "pedophile". Whatever legitimate uses there may ever be as to some forms of child nudity or sexual depictions, see *New York v. Ferber*, 458 U.S. 747, 775 (1982) (O'Connor, J., concurring), Knox's intentional pandering of children's panty-clad sexual organs cannot fit that possible exception.

In this regard, employing the pandering rule, when presented with "borderline" material, prevents innocent persons from being brought within the statute by requiring that guilty defendants be shown to have intended to exploit

the sexual aspect of the materials. Pandering analysis therefore acts in a manner that narrows construction of the child exploitation statute by allowing proof of intended sexual exploitation of a minor to eliminate any claims of innocent or serious value purposes.

In this case, the material pandered to, and defendant responded to, the lasciviously child–erotic ("prurient") interest in child sexuality or pedophilia, every bit as much as Ginzburg pandered to the voyeuristically erotic adult interest in titillation over adult sexuality with his non–mailable pornography. *Ginzburg*, 383 U.S. at 470. Under the specific facts of this case, these "peeping tom" views into the private areas of minors are well within the legitimate scope of this federal statute because they clearly are intended to exploit these minors in the sexual way that Congress and the courts have long recognized as harmful to the best interests of children.

4. The Record is Replete with Evidence of Pandering

The circuit court found, and there can be no serious dispute otherwise, that "the video tapes clearly were designed to pander to pedophiles." *United States v. Knox*, 977 F.2d 815, 817 (3rd Cir. 1992). The court further noted that:

> The catalogs described in detail the contents and intended effect of the films that could be purchased:
>
> "'Sassy Sylphs' will blow your mind so completely you'll be begging for mercy. Just look at what we have in this incredible tape: about 14 girls between the ages of 11 and 17 showing so much panty and ass you'll get dizzy. There are panties showing under shorts and under dresses and skirts; there are boobs galore and T-back (thong) bathing suits on girls as young as 15 that are so revealing it's almost like seeing them naked (some say even better)."

Id. at 818.

Not only were the tapes advertised and promoted for their titillating nature to Knox, but Knox used them for that purpose -- for sexual arousal of his pedophilic tendencies:

For instance, on the Nather II tape, Knox wrote

> "13–year old flashes" followed by "hot". Knox characterizes the second vignette as "15 year old shows nipple." Both Nather's and Knox's descriptions of the tapes clearly demonstrate that Knox was aware that the videotapes contained sexually oriented materials designed to sexually arouse a pedophile. Sufficient evidence was presented at the bench trial to support a finding that Knox was aware of the nature of the Nather tapes, and therefore knowingly possessed and received them.

Id at 825.

Knox's own conduct, and the circumstances of distribution and advertising, compel a finding that these tapes are child pornography. That the distributor, Nather Company of Las Vegas, claimed these tapes were "completely legal" is of no import. Just as Ginzburg's circulars claimed to be legal and "the result of recent court decisions", *Ginzburg*, 383 U.S. at 468, fn.9, the exploiter's self–classification is not significant. Knox knew he was walking a fine line. The mere fact that Nather stressed the legality of its tapes in its newsletters, which were found in Knox's apartment, put Knox on notice that such an assertion

was doubtful:

> Additionally, relying on Nather's disclaimer is tantamount to asking a hard core pornographer for legal advice as to whether the material he earns a living by selling is legal. Nather's disclaimer could not reasonably lead Knox to believe that the videotapes were legal. If anything, the need to profess legality should have alerted Knox to the films' dubious legality.

977 F.2d at 825.

To grant these kinds of materials constitutional protection merely ensures that thousands of children will continue to be victimized, both by being depicted in this manner, and by potentially becoming victims of a sexually aroused child molester. There will be no way to prevent sexually provocative depictions of scantily clad young girls and boys, with cameras focusing in on genital and pubic regions, from being traded in the marketplace. The worthy effort to prevent child sexual exploitation by drying up the market for child pornography used by pedophiles, which was so eloquently defended by this Court in *New York v.*

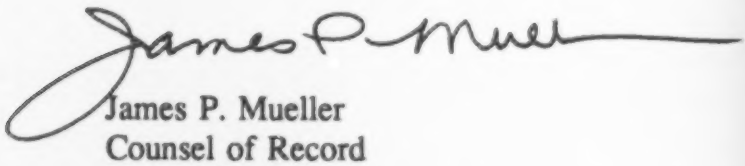
Ferber, would be significantly undercut by a reversal of pedophile Steven Knox's conviction.

CONCLUSION

For the above-stated reasons, the decision of the Court of Appeals should be affirmed.

Dated September 2nd, 1993.

Respectfully Submitted,



James P. Mueller
Counsel of Record
Len L. Munsil
5353 North 16th Street, Ste 400
Phoenix, Arizona 85016
(602) 265-1513

APPENDIX A

I HEREBY CONSENT to the filing of an *amicus curiae* brief by the National Family Legal Foundation in support of the respondent, United States, in the case *Stephen A. Knox v. United States*.

DATE: 7/28/93

Attorney of Record for Petitioner

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

July 29, 1993

James P. Mueller
Legal Counsel
National Family Legal Foundation
5353 North 16th Street
Pheonix, Arizona 85016

Re: Stephen A. Knox v. United States, No. 92-1183

Dear Mr. Mueller:

This is in response to your letter of July 20, 1993.

On behalf of the United States I hereby consent to the filing of a brief as amicus curiae on behalf of the National Family Legal Foundation in the above case.

Sincerely,

Drew S. Days, III/ecs

Drew S. Days, III
Solicitor General